

LICENSE AGREEMENT

This agreement is made as of the ____ day of _____ 2002, by and between AMERICAN FIBER SYSTEMS, INC., a corporation currently in good standing under the laws of the State of Ohio, having its principal business address at 100 Meridian Centre, Suite 250, Rochester, NY, 14618 ("AFS"), and the CITY OF SHAKER HEIGHTS, a municipal corporation organized under the laws of the State of Ohio, having its principal business address at 3400 Lee Road, Shaker Heights, Ohio, 44120 (the "CITY").

RECITALS

Whereas the CITY regulates the use of public property and the public right-of-way as defined in Section 153.01 of the CITY Ordinances; and

Whereas AFS wishes to locate, construct, maintain, operate, and remove facilities for the transmission of telecommunication messages facilities (hereinafter referred to as "Telecommunication Facilities") along, over, under, above and through certain public property and the public right-of-way within the corporate limits of the CITY ("Public Property"); and

Whereas both the CITY and AFS wish to document in writing the terms and conditions upon which AFS will locate, construct, maintain, operate, and remove facilities within that Public Property subject to regulation by the CITY.

THEREFORE, in consideration for the mutual covenants, promises, conditions, and terms set forth herein, the CITY and AFS agree as follows:

Section 1: Grant of Licenses

- 1.1 Without reducing its police power to adopt and enforce ordinances of general applicability necessary to the health, safety and welfare of the public, the CITY grants AFS a non-exclusive license and franchise to locate, construct, maintain, operate, and remove Telecommunication Facilities necessary for the transmission of telecommunication traffic into, through, and from the CITY in the manner described in and pursuant to the conditions in this license agreement and the franchise granted by the CITY Council of Shaker Heights.
- 1.2 The CITY grants AFS a non-exclusive license to locate, construct, maintain, operate, and remove Telecommunication Facilities underground along the route described more fully in the attached drawings marked Exhibits 1 through 17. Said route shall be restricted to tree lawns and grass median strips whenever practicable, and shall be parallel to, but not in or under the roadway.
- 1.3 The licenses and franchise granted herein shall become effective on the first day of the first month after the execution of this agreement, and shall continue in duration for a period of ten (10) years ("Initial Term"). Absent written notice by one party to the other,

mailed or transmitted no less than sixty days prior to expiration of the Initial Term or any succeeding term, these licenses and franchise shall automatically be renewed for a succeeding term of five (5) years. Upon termination of these licenses, AFS shall remove all installed Telecommunication Facilities or transfer said Telecommunication Facilities to an entity that will be responsible for the continued compliance with the terms of this agreement and maintenance of said facilities. AFS must, before any such transfer, obtain prior written consent from the CITY, which consent shall not be unreasonably withheld. Should this license agreement and franchise terminate and AFS fails to transfer ownership or remove its Telecommunication Facilities within one (1) year of said termination, said Telecommunication Facilities shall be deemed abandoned and, upon thirty (30) days notice to AFS, all rights of use and ownership shall inure to the CITY. In the event that, because of AFS's failure to remove all Telecommunication Facilities after abandonment or termination of this agreement, the CITY must remove such Telecommunication Facilities, AFS shall pay the CITY for the actual cost of said removal.

- 1.4 It is the intent of the parties that this agreement may be amended from time to time in accordance with this paragraph to allow AFS to implement new services and development, or to conform to any terms allowed by law, and to allow the CITY to better protect the health, safety and welfare of its residents. Each party agrees to bargain in good faith with the other upon the initiation of any such proposed amendments. The CITY shall not unreasonably withhold its consent to amendments requested by AFS, and AFS shall not unreasonably withhold its consent to amendments requested by the CITY.

Section 2: Provisions Regarding AFS's Obligations

- 2.1 AFS shall file and maintain with the CITY Public Works Department complete, accurate, and current maps and drawings showing the precise location of its facilities and the schedule for installation and construction thereof. AFS shall construct and maintain all such facilities consistently with this agreement and the underground construction specifications provided by the Director of Public Works. AFS shall maintain all Telecommunication Facilities consistent with federal, state, and local laws.
- 2.2 AFS recognizes that it is the policy of the CITY that all Telecommunication Facilities be located underground whenever possible. AFS shall therefore place its Facilities underground as required in paragraph 1.2 hereof, and in addition, shall install underground conduit along the entire length of the route within the municipal limits of Shaker Heights that will be utilized by AFS, in an amount sufficient to accommodate to no less than three times the Facilities capacity necessary to AFS, said conduit to be available for use by other fiber optic cable or telecommunications providers. Notwithstanding terms of this or other agreements to the contrary, in the event that any other fiber optic cable or telecommunications provider is granted a license and franchise to use Public Property along the CITY's right-of-way, AFS shall use its best efforts to enter into an agreement or agreements for the sale or leasing of said Facilities and/or conduits to said providers. For purposes of the obligations created by this section 2.2, "best efforts" shall not include any obligation to accept less than the market rate for the

sale or leasing of Telecommunications Facilities or conduit. Notwithstanding terms of this or other agreements to the contrary, in the event that any other fiber optic cable or telecommunications provider is granted a license and franchise to use Public Property along route of AFS's Facilities within the CITY's right-of-way, the CITY shall use its best efforts to induce said providers to make use of the excess conduit installed by AFS pursuant to this Agreement.

- 2.3 AFS shall not maintain any nuisance and shall not, at any time, permit any condition that causes the CITY to be in violation of any right or duty existing under Chapter 723 of the Ohio Revised Code.
- 2.4 In conjunction with its construction, maintenance, or removal of facilities, AFS shall, at its cost, repair, replace, or restore to its former state of usefulness all Public Property that is damaged or disrupted by AFS's construction, maintenance, or removal of facilities.
- 2.5 As soon as reasonably practicable, AFS, upon receipt of written notice from the CITY informing AFS of damage or failure of any public property as a result of AFS's construction, maintenance, or removal of facilities, shall repair, replace, or restore all such Public Property to the condition and state of usefulness maintained prior to AFS's construction, maintenance, or removal of facilities.
- 2.6 Telecommunication Facilities shall be installed parallel with existing telephone and electric utility wires whenever possible.

- 2.7 Multiple cable configurations shall be in parallel arrangement and bundled in accordance with engineering, aesthetic, and safety considerations.
- 2.8 Installation, operation and maintenance shall be such that no interference is caused to existing communications systems and so as not to distort or interfere with direct off-the-air signals. In the event AFS is notified that its system is causing such interference, it shall take all reasonable steps to eliminate such interference.
- 2.9 AFS may trim trees or other vegetation on public property or property owned by the CITY or encroaching upon the public right-of-way to prevent branches or leaves from touching or otherwise interfering with AFS wires, cables or other structures. All trimming or pruning shall be at the sole cost of AFS. Any trimming of trees in the Public Right-of-Way shall be performed in accordance with standards set forth by the CITY Forester and ANSI 300.
- 2.10 AFS may contract for trimming or pruning services with any person approved by the CITY prior to the rendering of such services, which approval shall not be unreasonably withheld.
- 2.11 In the event of an emergency that requires the CITY to repair, replace or restore Public Property as a result of AFS's construction, maintenance, or removal of facilities, AFS shall promptly pay the CITY the CITY's actual cost of repairs, replacements or restoration necessary to bring the Public Property back to its former condition and state of

usefulness. The actual cost of repairs shall be based upon the rates set forth in Chapter 123 of the Codified Ordinances of the CITY of Shaker Heights.

- 2.12 Prior to installing its facilities, AFS shall obtain from the CITY Director of Public Works and Director of Building all permits required by CITY Ordinance. AFS shall pay all reasonable direct incremental costs incurred by the CITY in inspecting and reviewing any plans and specifications and granting permits to AFS, in addition to all other direct incremental costs incurred through the life of this Agreement.
- 2.13 AFS shall submit evidence of comprehensive general liability insurance for bodily injury and death in an amount not less than One Million Dollars (each person)/One Million Dollars (each accident); property damage insurance in an amount not less than Two Hundred Fifty Thousand Dollars (each occurrence)/Two Hundred Fifty Thousand (aggregate); and Two Thousand Dollars (\$2,000) med/pay insurance. The insurer shall certify that in the event of cancellation or material change of the insurance, at least ten (10) days written notice of such cancellation or material change shall be given the CITY. The CITY shall be named an additional insured on such policy(ies).
- 2.14 AFS shall indemnify, defend, and save harmless the CITY and the CITY's officers, agents and employees from all claims, suits, costs, damages and liabilities resulting from or arising out of AFS's acts or omissions in the exercise of its rights pursuant to the licenses created herein.

- 2.15 AFS shall install one (1) distribution hub along Kinsman Road in the City of Shaker Heights, placing all Facilities associated with said hub underground, up to one hundred (100) yards east of the intersection of East 154th and Kinsman Road, said hub to connect the CITY's Department of Public Works to the conduit system to be installed by AFS.
- 2.18 AFS shall agree to relocate any of its Telecommunications Facilities at the request of the CITY in the event those facilities impact a right-of-way improvement project. The relocation shall be done at no cost to the CITY.

Section 3: Provisions Regarding CITY Obligations

- 3.1 The CITY shall not be liable to AFS or any other person for any loss or damage to AFS or any other person which may occur from any cause resulting in interruption of communications including, but not limited to, damage that may be caused by any activity or condition not within the control of the CITY, its employees, contractors, or agents.
- 3.2 The CITY shall use its best efforts to approve any permit applications submitted by AFS to the CITY Engineer within thirty (30) days of the date such applications are submitted.
- 3.3 The CITY represents and warrants that it holds title to all Public Property described in this Agreement, that it has all legal authority necessary to grant the franchises and licenses described herein, and that it will indemnify, defend, and save harmless AFS and AFS's officers, agents, and employees from all claims, suits, costs, damages, and

liabilities resulting from or arising out of the CITY's acts or omissions in the exercise of the CITY's legal authority.

Section 4: General Provisions

- 4.1 Any notice to be provided a party to this agreement shall be deemed delivered upon depositing the same in the U.S. Mail or when made via telecopier facsimile, receipt confirmed, addressed or transmitted as follows:

If to AFS: Amy M Gilchrist
 American Fiber Systems, Inc.
 100 Meridian Centre
 Suite 250
 Rochester, NY 14618-3979
 Telecopier (716) 756-1966

If to the CITY: City of Shaker Heights
 Director of Public Works
 Department of Public Works
 15600 Chagrin Boulevard
 Shaker Heights, Ohio 44120
 Telecopier: (216) 491-8829

- 4.2 The CITY and AFS both represent and acknowledge that the licenses granted herein are not conveyances of any property interests in Public Property.
- 4.3 The licenses granted herein shall be revocable in the event of a material breach of this agreement that is not cured within thirty (30) days of delivery of notice of such breach. Upon any such event of revocation, AFS shall cease all operations on Public Property and shall remove or abandon its facilities as provided in section 1.3 herein.
- 4.4 AFS may assign this agreement and/or the licenses granted herein to any parent affiliate, or purchaser of all or substantially all AFS's assets without the CITY's prior consent; provided however, in the event of such assignment, the CITY may in its sole discretion, require such assignee to provide the CITY with a performance bond or with such other security deemed necessary by the CITY to secure performance of the assignee's obligations hereunder. This agreement and/or the licenses granted herein may be assigned to others not mentioned herein with the consent of both parties hereto, which consent shall not be unreasonably withheld.
- 4.5 This agreement shall be construed according to the laws of the State of Ohio.
- 4.6 If any term or provision of this Agreement, or any portion thereof, or the application thereof to any person or circumstances shall, to any extent, be invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not

be affected thereby, and each other term and provision of this Agreement shall be valid and be enforced to the fullest extent permitted by law.

On Behalf of:

On Behalf of:

The CITY of Shaker Heights, Ohio

American Fiber Systems, Inc.

mdd/29219/0001/American Fiber Systems, Inc./Rights of Way Issues/Shaker Heights/2 20 02 license agreement